No. 07-1209

In the Supreme Court of the United States

JAMES B. PEAKE, M.D.,
SECRETARY OF VETERANS AFFAIRS, PETITIONER

v.

WOODROW F. SANDERS

JAMES B. PEAKE, M.D.,
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v.

PATRICIA D. SIMMONS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR PETITIONER

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Under the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, "due account shall be taken of the rule of prejudicial error" when courts review agency action. 5 U.S.C. 706. The uniform view of the courts of appeals has been that Section 706 imposes on the party challenging an agency's action the burden of showing not only that the agency erred but also that the error was prejudicial. That view was well settled by 1988, when Congress adopted the language of Section 706 in directing that the United States

Court of Appeals for Veterans Claims (Veterans Court) "take due account of the rule of prejudicial error" in reviewing administrative benefits determinations. 38 U.S.C. 7261(b)(2) (Supp. V 2005). The Federal Circuit erred in disregarding the settled construction of that statutory language and instead adopting a presumption of prejudice whenever the Veterans Administration (VA) fails to give a benefits claimant the notice required by the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096. Its decisions will consume adjudicatory resources with a large number of unnecessary remands in cases involving technical notice errors, delaying the resolution of meritorious claims. This Court's review is warranted.

A. The Decisions Below Cannot Be Reconciled With The Decisions Of Other Courts Of Appeals Interpreting Materially Identical Language In The APA

Respondents make little effort to dispute that the weight of authority supports the view that Section 706 imposes a burden of showing prejudice on the party challenging agency action. Respondents note (Simmons Br. in Opp. 8 n.3) that some cases "do not address the burden of proof at all." That is hardly surprising, since in some cases, the allocation of the burden is irrelevant to the outcome, so there is no need to discuss it. Nor is it significant that some courts have called for "caution," *id.* at 9, in the application of the rule of prejudicial error. Courts should indeed be "cautious," *id.* at 8, in evaluating whether an error is prejudicial, just as they should conduct a "careful" review in answering the antecedent question whether the agency erred, *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971). But the appropriateness of judicial circum-

spection says little, if anything, about how to allocate the burden of showing prejudice.

Respondents emphasize (Simmons Br. in Opp. 8) that the APA, like Section 7261(b)(2), calls for courts to take "due" account of the rule of prejudicial error. From this they infer that reviewing courts should have "flexibility" in the rule's application. But whatever the proper scope of flexibility in *applying* the rule, the statute does not give reviewing courts unlimited discretion to decide what the rule is. On the contrary, the use of the definite article in the phrase "the rule of prejudicial error" demonstrates that Congress intended for courts to apply a specific, pre-existing rule. As explained in the petition, that rule is one that places the burden of showing prejudice on the party challenging the agency's action.

Respondents cite cases that, they say, interpret the APA to impose on the government the burden of showing a lack of prejudice in certain circumstances. Simmons Br. in Opp. 9-10. But one of the cases they cite did not interpret the APA at all; it held that Section 706 was inapplicable. See *Jicarilla Apache Tribe* v. *Andrus*, 687 F.2d 1324, 1336 (10th Cir. 1982) ("We are not persuaded that the violation * * * fits within the § 706 pattern of prejudicial error."). And several of the other cases did set aside agency action under Section 706, but they did so only after identifying evidence of prejudice. See, *e.g.*, *Sprint Corp.* v. *FCC*, 315 F.3d 369, 377 (D.C. Cir. 2003) ("Sprint has made a colorable claim that it would have more thoroughly presented its arguments had it known that the Commission was contemplating a rulemaking."); *Sierra Club* v. *United States Fish & Wildlife Serv.*, 245 F.3d 434, 444 (5th Cir. 2001) (noting that reliance on an invalid regulation "permeates" the agency's decision and "directly informed [its] conclusion").

In any event, the cases identified by respondent are, at most, evidence of conflicts within some circuits, since the circuits on whose decisions they rely have also squarely held that Section 706 requires the party challenging the agency's action to bear the burden of showing prejudice. See Pet. 10. And even if some circuits had unequivocally endorsed the Federal Circuit's view—which they have not—there would still be a deep conflict between the Federal Circuit's interpretation of Section 7261(b)(2) and nearly every other circuit's interpretation of the materially identical language of the APA.

B. There Is No Basis For Creating A Unique Rule Of Prejudicial Error Applicable Only To VA Adjudications

1. Like the court of appeals, respondents contend that "unique" features of the veterans-benefit adjudication process justify departing from the uniform construction of the rule of prejudicial error under the APA. As explained in the petition (at 16-17), that argument rests on a confusion between the administrative claims-adjudication process, which is designed to be informal and non-adversarial, and the process of judicial review, which is not. More to the point, Congress's general desire to create a "pro-claimant" adjudication system (Simmons Br. in Opp. 12; Sanders Br. in Opp. 4) cannot displace the specific statutory language of Section 7261(b)(2). Because it chose to repeat language that already had a settled judicial interpretation, Congress should be presumed to have intended to incorporate that interpretation. See *Merrill Lynch, Pierce, Fenner & Smith Inc.* v. *Dabit*, 547 U.S. 71, 85-86 (2006). That presumption is reinforced here by the Senate Committee Report accompanying Section 7261(b)(2). See S. Rep. No. 418, 100th Cong., 2d Sess. 61 (1988). That report—which respondents do not address—did not simply refer to the APA in explain-

ing the source of Section 7261(b)(2); it actually cited a Ninth Circuit decision that had held that "'the burden of showing that prejudice has resulted' is on the party claiming injury from the erroneous rulings." *NLRB* v. *Seine & Line Fishermen's Union*, 374 F.2d 974, 981, cert. denied, 389 U.S. 913 (1967) (quoting *Palmer* v. *Hoffman*, 318 U.S. 109, 116 (1943)). It is the language of Section 7261(b)(2), not general principles of a "pro-claimant" system, that is controlling here.

Respondents seek to avoid the application of the principle that the more specific provision is controlling, contending that "the prejudicial error rule is a general right of review, while the VCAA establishes specific notice rights for veterans." Simmons Br. in Opp. 15 n.8. That argument overlooks that Section 7261(b)(2) is a prejudicial-error rule specifically directed at the review of veterans-benefit adjudications. In determining how to allocate the burden of showing prejudice, Section 7261(b)(2) is the statute that offers the most relevant guidance.

2. Respondents rely (Simmons Br. in Opp. 15) on the canon that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991). Section 7261(b)(2), however, is not a substantive "provision[] for benefits"; it is a procedural statute governing the scope of judicial review. More importantly, the canon is applicable only when a statute is ambiguous. Cf. *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). "Ambiguity is a creature not of definitional possibilities but of statutory context," *ibid.*, and in light of the well-settled meaning of the language in the APA that Congress borrowed for Section 7261(b)(2), that provision is not ambiguous.

3. Respondents repeat the error of the court of appeals, Pet. App. 15a, in relying on the treatment of harmless error

in *Kotteakos* v. *United States*, 328 U.S. 750 (1946), and *O'Neal* v. *McAninch*, 513 U.S. 432 (1995). Those cases interpreted a different statute that uses different language, and they involved the review of errors "in a *criminal* proceeding" in which "someone's custody, rather than mere civil liability, is at stake." *Id.* at 440. Respondents argue (Simmons Br. in Opp. 17; Sanders Br. in Opp. 1-4) that *O'Neal*'s analysis is applicable to civil cases outside of the habeas context, but even after *O'Neal*, most courts of appeals have held that the party asserting error in a civil case has the burden of showing prejudice under the harmless-error rules of 28 U.S.C. 2111 or Federal Rule of Civil Procedure 61. See Pet. 20-21; see also *Tesser* v. *Board of Educ. of the City Sch. Dist.*, 370 F.3d 314, 319-320 (2d Cir. 2004); *Dresser-Rand Co.* v. *Virtual Automation Inc.*, 361 F.3d 831, 841-842 (5th Cir. 2004); *Rogers* v. *City of Chicago*, 320 F.3d 748, 751 (7th Cir. 2003); *Cigna Ins. Co.* v. *Oy Saunatec, Ltd.*, 241 F.3d 1, 8 (1st Cir. 2001); *Qualley* v. *Clo-Tex Int'l, Inc.*, 212 F.3d 1123, 1127-1128 (8th Cir. 2000); *Piamba Cortes* v. *American Airlines, Inc.*, 177 F.3d 1272, 1305-1306 (11th Cir. 1999), cert. denied, 528 U.S. 1136 (2000); but see *Obrey* v. *Johnson*, 400 F.3d 691, 699-702 (9th Cir. 2005).

In any event, whatever the relevance of *Kotteakos* and *O'Neal* to appellate review of a lower-court decision in a civil case, those decisions are not relevant to judicial review of agency action. Like the court of appeals, respondents ignore the significant differences between the relationship of agencies to reviewing courts and that of trial courts to appellate courts. See Pet. 21. They also overlook the features of the VA adjudication system that provide multiple opportunities to correct any initial deficiency in notice, thus reducing the likelihood of prejudice from a notice error, and making a presumption of prejudice especially inappropriate. See Pet. 22-23.

C. The Question Presented Warrants This Court's Review

The Federal Circuit's rule of presumptive prejudice in cases of VCAA notice error warrants this Court's review because it will burden the VA claims-processing system by generating a large number of unnecessary remands in cases where there was no prejudice from the notice error. Those remands will not lead to different results, but they will divert the agency's limited resources and delay the adjudication of meritorious claims.

Respondents attempt to minimize the burden on the VA by citing (Simmons Br. in Opp. 18) statistics showing that the Veterans Court hears over 4600 cases each year and remands over 2000 of them. Those numbers do nothing to refute the point that the additional remands produced by the decisions below will impose a significant burden. In any event, the number of cases that are appealed to the Veterans Court is not fixed; rather, it can be expected to increase in response to the decisions below, which make it easier for claimants to win appeals because of technical errors in a VCAA notice.

Indeed, the frequency of appeals challenging the sufficiency of the notice will only increase as the Veterans Court continues to issue decisions further defining the requirements of adequate notice. For example, in *Vazquez-Flores* v. *Peake*, 22 Vet. App. 37, 43-44 (2008), the Veterans Court determined that when the VA receives a claim for an increased disability rating, it is required, in certain circumstances, to provide information tailored to the claimant's "diagnostic code" in the initial notice letter in order for the notice to be considered sufficient under Section 5103(a). Under the rule adopted by the court of appeals, many increased-rating claims pending before, or to be appealed to, the Veterans Court will require a remand, a new notice, and readjudication unless the Secretary can somehow demon-

strate a lack of prejudice resulting from the insufficient notice.

Respondents point out (Simmons Br. in Opp. 18-19) that it is not impossible for the agency to demonstrate a lack of prejudice. That is true, and there may well be cases, like those respondents cite, in which the lack of any prejudice is apparent on the record. But there will undoubtedly be other cases in which there is no prejudice but the VA is nevertheless unable to demonstrate a lack of prejudice because of the difficulty of proving a negative. As noted in the petition (at 21-22), the claimant is uniquely well suited to identify prejudice when it exists.

Finally, noting Congress's enactment of the VCAA to overturn *Morton* v. *West*, 12 Vet. App. 477 (1999), respondents argue (Simmons Br. in Opp. 20) that Congress "has in the past rejected efforts to preserve agency resources by burdening claimants." But in enacting the VCAA, Congress merely codified the notice that the VA was already providing to claimants at the time of enactment. See VCAA § 3(a), 114 Stat. 2096; H.R. Rep. No. 781, 106th Cong., 2d Sess. 9 (2000). The enactment of the VCAA hardly demonstrates that Congress is indifferent to the preservation of the VA's adjudicatory resources, still less that it intended (without saying so) to reverse the longstanding allocation of the burden of showing prejudice.

D. These Cases Are Appropriate Vehicles For Resolving The Question Presented

Respondents observe (Simmons Br. in Opp. 21) that these cases are currently in an interlocutory posture because the court of appeals ordered a remand to the Veterans Court. That is not a reason to deny review, because the very question in these cases is whether the cases are *appropriately* in an interlocutory posture, *i.e.*, whether the re-

mand decisions were proper. Under the rule adopted by the court of appeals, the issue in these cases can arise *only* in an interlocutory posture. When a remand is ordered because of a VCAA notice error, the claimant will be given the proper notice and the case will be readjudicated, thus mooting the question whether the remand was appropriate. When a remand is not necessary even though the government bears the burden of proof under the court of appeals' rule, then the issue will not be presented at all. Thus, if the issue in these cases cannot be reviewed when it arises in the context of a remand order, it cannot be reviewed at all.

Respondents' arguments about their individual cases also do not provide a basis for denying review. Simmons asserts (Br. in Opp. 21) that a remand of her "case" is required irrespective of whether or how the Court decides the question raised in this petition, because, in addition to remanding due to a VCAA notice error, the court of appeals also ordered a remand to allow the agency to conduct a medical examination. That is incorrect. Simmons had two separate claims pending before the Board and the Veterans Court: a claim for an increased rating for her hearing loss in her left ear (the claim involved in this petition), and a separate claim for secondary service connection for hearing loss in her right ear (a claim that is not addressed by this petition). Those two claims are separate and distinct from each other. See 38 U.S.C. 1110, 1131; 38 C.F.R. 3.303, 3.310(a); *MacPhee* v. *Nicholson*, 459 F.3d 1323, 1327-1328 (Fed. Cir. 2006) (rejecting argument that claim for secondary service connection is the same as a claim for an increased rating for the primary service-connected condition). The medical examination ordered by the court of appeals relates only to the right-ear claim. Pet. App. 76a. Accordingly, a decision by this Court would finally resolve Simmons' left-ear claim, in addition to finally resolving the

issue for all other cases involving challenges to the initial notice provided by the Secretary. The pendency of Simmons's separate right-ear claim is therefore not a reason to deny review.

Simmons also contends (Br. 21-22) that review is inappropriate in Sanders's case because the question presented is merely "hypothetical," since "there has been no finding of error." It is true that the court of appeals did not determine whether there had been a VCAA notice error in Sanders's case. Pet. App. 14a-21a. But the court did order a remand for consideration of that issue, a remand that was entirely unnecessary and inappropriate under the government's view of the law. And in any event, the Veterans Court did find an error on remand: it held that the VA's notice was defective and untimely, and, applying the rule of presumptive prejudice, it remanded the case to the Board. See *Sanders* v. *Mansfield*, No. 03-1846, 2007 WL 4386066, *4-5 (Vet. App. Nov. 28, 2007). Thus, the "predicate to the burden allocation question—the existence of a notice error" (Simmons Br. in Opp. 22) has now been established in Sanders's case (as in Simmons's, Pet. App. 78a), so both cases squarely present the question identified in the petition.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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